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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No. 820.

MADELINE V. SMITH, *Petitioner,*

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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To the Honorable Chief and the Associate Justices of the Supreme Court of the United States:

The petitioner, Madeline V. Smith, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

Neither the District Court nor the Court of Appeals wrote an opinion.

The order of the Court of Appeals affirming the judgment of the District Court, reads as follows:

Before Simons, Chief Justice, Allen and Miller, Circuit Judges.

> "*Per Curiam.* In this case appellant was indicted for willful evasion of income tax in her returns for the calendar years 1949 and 1950, found guilty by the jury, and duly sentenced by the Court.
>
> Appellant's principal contention is that the court committed reversible error in admitting as evidence the computation of income which appeared upon certain charts used by a Special Agent with the Intelligence Division of the Internal Revenue Service to explain his testimony. The Court properly instructed the jury with reference to these charts, that they were offered merely in explanation of the witness' testimony and computations, and it was for the jury to say 'whether there is *competent* evidence in the record to support the figures as shown by these charts.' The admission of such tabulations as an aid to the jury does not constitute reversible error. It has been approved by this Court in recent cases of income tax evasion. In *Gariepy* v. *United States,* 189 F. 2d 458, 462 (C. A. 6), the Court declared that the computation was at best 'but an estimate, but as an estimate it was entitled to the consideration of the jury because based on substantially the entire evidence in the record.' Cf. *Eggleton* v. *United States of America,* 227 F. 2d 493 (C. A. 6); *American Vitrified Products Company* v. *Wyer and Hansen,* 221 F. 2d 447 (C. A. 6). The use of such calculations was approved by the Supreme Court in *United States* v. *Johnson,* 319 U. S. 503, 519. The rec-

ord shows that within the holding of the Johnson case the trial court herein left the jury 'free to exercise its untrammeled judgment upon the worth and weight' of the evidence given in these charts.

The trial was fair. It was shown by overwhelming evidence that appellant had made substantial understatements of her income for the years in question. No reversible error appears in the record and it is ordered that the judgment of the District Court be and it hereby is affirmed."

JURISDICTION.

The order of the Court of Appeals affirming the judgment was entered December 12th, 1956, and the petition for a rehearing was denied by order entered February 6, 1957. This petition, accompanied by certified transcript of the record, as required by Rule 21, is filed with the Clerk within thirty days after the entry of the judgment affirming the conviction. The jurisdiction of this Court is invoked 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Trial Court erred in permitting over the objections of the petitioner a series of prejudicial charts (Exhibits 4, 5, 6, 7, 8, 9, testimony of Norris), prepared by the witness Norris more than two years before the said trial, to be introduced as exhibits, shown to the jury, and allowed to be taken into the jury room, said charts not being a summary of the evidence introduced in open court, but based on outside investigations conducted by the witness Norris.

2. Whether the Trial Court erred in permitting improper and highly prejudicial remarks to be made to the jury by the District Attorney in his closing argument, and in refusing to grant petitioner's motion for a mistrial on account of said prejudicial remarks.

3. Whether the Trial Court erred in permitting the witness Norris to testify with reference to approximately one hundred and twenty cases for the years 1949 and 1950 for which no proof was offered in open court, and allowing the witness Norris to fix the fees alleged to have been received by the defendant Smith from former clients of hers in these one hundred and twenty cases, which former clients the witness Norris testified were either dead, missing, or could not be located, based on an average of fees she had received in other cases.

4. Whether the sentence imposed by the Trial Court is illegal and excessive, in that: (a) The petitioner should have been sentenced under Section 3616 (a) of the Internal Revenue Code of 1939, rather than Sec. 145 (b).

5. Whether the defendant was denied a fair and impartial trial.

STATEMENT.

The record consists of three printed volumes comprising the appendices to the briefs in the Court of Appeals, the petitioner's appendix consisting of two volumes, an appendix and supplemental appendix. The appendix is numbered 1a to 316a, and the supplemental appendix is numbered 1a to 39a. Respondent's appendix is in one volume, numbered 1b to 107b.

On October 5, 1955, a two-count indictment was returned in the United States District Court for the Western District of Tennessee, Western Division.

The two counts cover the calendar years 1949 and 1950, respectively (Appellant's Appendix, pages 4a, 5a).[1]

On the 13th day of February, 1956, after a trial which commenced on the 6th day of February, the petitioner was convicted on both counts, and was sentenced to three years' imprisonment on each of the two counts, the sentences to run concurrently, and was ordered to pay a fine of five thousand dollars on each count, making a total fine of ten thousand dollars (Appellant's Appendix 33a, 34a, 35a).

The petitioner reported a gross income for the year 1949 in the sum of $14,252.30, and for the year 1950 in the sum of $14,950.50 (Appellant's App. 67a-68a).

The Government claimed a tax deficiency for the year 1949 in the sum of $6,378.79, and for the year 1950 in the sum of $6,720.25.

It was contended by the Government that the defendant failed to report all of her taxable income received from the practice of law, and sought to show this by the testimony of a portion of her former clients (Appellee's App. 8b-78b), and by the so-called net worth and expenditures and withdrawal method (Appellant's appendix, Hall, 95a-119a) (Appellant's Appendix, Norris, 131a-221a).

The petitioner, it was testified to at the time of the trial, was sixty-two years of age, and had been practicing law in Memphis, Shelby County, Tennessee, for thirty years or more (Appellant's App. 241a). She specialized in divorce cases, representing both men and women clients. Her practice did not extend beyond domestic matters, except in a very few instances where she did accept employment in matters involving other phases of law.

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[1]Except as otherwise indicated, record citations refer to the appendix and supplemental appendix to petitioner's brief in the Court of Appeals.

The good reputation of the petitioner, both as a citizen and as a lawyer, was established by the most prominent and respected members of the Memphis and Shelby County Bar (Appellant's Appendix 232a, 234a, 235a, 237a, 238a, 239a, 242a, 247a, 249a, 250a).

The exhibits 4 and 5 purport to show the figures contained in the indictment (App. 4a, 52, 183a, 217a). That is the taxes paid for the years 1949 and 1950 by the petitioner, also the taxes the Government contends she should have paid (App. 158a, 159a, 160a, 161a, 162a, 163a).

Exhibits 6 and 7 purport to be "computations of income" reported by the defendant, and "as corrected" for the years 1949 and 1950 (App. 166a, 167a).

Exhibit 8 purports to show items making up "unreported income" and "Government contentions for the years 1949 and 1950." (App. 173a).

Exhibit 9 purports to show cases making up "unreported income per indictment" and "Government contentions." (App. 176a, 177a, 178a).

These exhibits were introduced over the vigorous objection of counsel. The exhibits were the work of Hubert A. Norris, Special Agent with the Intelligence Division of the Internal Revenue Service (App. 131a).

He was permitted to stay in the courtroom during the entire proceedings, heard all of the testimony of the Government witnesses, and was the last witness for the Government.

During the argument with reference to the objection made by counsel as to the competency of Exhibits 4 and 5, the witness, Norris, testified as follows (App. 160a):

"The Court: Just a moment. Mr. Hanover says that these exhibits were prepared before the trial of the case, is that true?

Mr. Joyner: Yes, sir.

The Court: Now, during the trial it has been developed from time to time, as the witnesses were introduced, *that certain items were questionable as to whether or not they were income,* the amount of reported income, the amount of reported income to this defendant were all taxable items.

I have noticed Mr. Norris, in sitting there at the counsel table, has made notes, a good many notes. I am just wondering, now, if he is prepared to alter these figures shown by the blownup exhibits so as to take into account these items the Court has in mind. Have you done that, Mr. Norris?

A. I believe that there is not a chart there that will not be supported or cannot be properly supported by the evidence that has already been given.

Direct Examination by Mr. Joyner, Assistant District Attorney (Appellant's App. 165a).

Q. Now, let me get this straight, so there will be no question about it. You, of course, did prepare these charts in advance?

A. Yes, sir.

Q. *And I will ask you whether or not, since the charts have been prepared and since the proof has come in, you have prepared those figures, your figures made in advance, with the figures which we have presented here by the various witnesses?*

A. *Yes, I have kept a fairly close record on the figures that were used in preparing these charts and the figures of the income items testified to by the witnesses.*

Q. *Now, in your opinion as an expert on such matters—there are some discrepancies, aren't there?*

A. *Why certainly, yes, sir.*

Q. —*But substantially are the figures the same?*

A. *Yes, sir, they will be substantially the same.*

Q. I would like to have you pass me, then, the next chart containing that information, and we will pass that to Mr. Hanover.

Mr. Hanover: The same objection, may it please the Court." (App. 165a).

This testimony applies, of course, equally to all the exhibits introduced by this witness.

The charts were prepared in advance of the trial (App. 165a).

On cross-examination (App. 217a), the witness testified that the information as to the indictment came from the investigation he and Agent Fahr made, and that he had the information in September, 1953, more than two years before the trial.

Exhibits 6 and 7, according to Government counsel, was the manner in which the Government developed the figures that went into the indictment, and were admittedly prepared before the trial (App. 166a).

The Court observed that the chart was "*subject to some adjustment, here, there, and yonder.*" (App. 166a).

The Court stated that both Government and defendant counsel would have "*the privilege of examining the witness with respect to any alterations that are necessary from the proof we have heard.*" (App. 166a).

The Court itself recognized that there were discrepancies between the record and the testimony and exhibits of the witness Norris.

Exhibit 8 was prepared in advance from information obtained prior to the trial. The witness testified he prepared the information from the defendant's books, which

were never introduced, and comparing the "book figures" with the *testimony of witnesses who appeared in Court* (App. 175a, 176a).

Exhibit 9 is subject to the same objection, and is subject to the same argument (App. 176a, 177a).

The figures in that chart were based on a so-called "list of cases," showing only that the defendant had represented one of the parties. The introduction of the list had been previously objected to.

It was candidly admitted by Assistant District Attorney Joyner (App. 182a) that the witness took into consideration computations based on the number of cases filed by the defendant, on which the *Government produced no proof* (App. 183a, 184a, 185a, 186a, 187a, 188a). Also, in making up these figures, the witness Norris took into consideration his conclusion as to the average fee in 120 cases filed in 1949 and 1950 (See argument, Question Presented No. 3).

The witness also had before him for consideration in preparing said charts exhibit No. 11 of witness Hall (App. 191a, 112a, Cross-Examination 116a, 117a, 118a, 119a) an admittedly fictitious figure contained in the exhibit, with a discrepancy of $32,000.00 in deposits for the year 1949.

The "charts" and all other exhibits, including Hall Exhibit No. 11, were taken into the jury room by the jury when it commenced its deliberations (Supp. App. 37a).

During part of the testimony of this witness he was interrogated as to a qualified "expert witness." Later the Government repudiated this theory.

During an objection to the testimony of the witness Norris, we referred to him as "an expert." (App. 159a). There was no denial by the Government. On direct examination, Assistant District Attorney Joyner asked the

witness Norris to express his *"opinion as an expert,"* thus definitely labeling the witness as an expert (App. 165a). Yet, further along, on direct examination, when counsel again vigorously objected, and referred to the witness as an "expert," the trial judge made this observation:

> The Court: "Now, see here, Mr. Hanover, in the *first place, the witness is not testifying as an expert."*

This expression by the Court was acquiesced in by District Attorney Fitzhugh (App. 185a). Counsel then objected that if the witness was not testifying as an expert, then his testimony had no value whatsoever. The record shows the objection was overruled (App. 185a). Again (App. 194a), the District Attorney, Mr. Fitzhugh, stated that the witness Norris *was not testifying as an "expert."* This was reiterated in the District Attorney's closing remarks (App. 306a).

Other testimony of the witness Norris pertaining to the charts is as follows (Appellant's Appendix 182a-183a):

> "Mr. Joyner: Well, I would like to go into it to this extent, may it please Your Honor. *It is part of the Government's proof in this matter that there were other cases involved, and we want to make that proof now, which witnesses are dead or unavailable, out of pocket, and things of that nature.*
>
> Mr. Dave Hanover: Now, may it please the Court.
>
> Mr. Joyner: And I think we are entitled to show those cases.
>
> Mr. Dave Hanover: I think that is wholly incompetent.
>
> Mr. Joyner: And to show—
>
> Mr. Dave Hanover: I object to his making a speech, or—
>
> The Court: One at a time, there, gentlemen. One at a time. Let's see what he is getting at here.

Mr. Joyner: I say we are entitled to do that, *to prove by this witness that in preparing his charts he took into consideration computations based on the number of cases which were filed by this defendant on which we have produced no proof—that is, we cannot produce the client. There are* some five-hundred-odd cases involved here. *And we don't contend that we could produce each and every one. But we are entitled to show that he took into consideration other cases on which we haven't offered the client, as supporting a part of the figure which we say goes to make up the unreported income.*

Mr. Dave Hanover: Your Honor, I would like to be heard.

The Court: *I don't understand your statement about it. I don't understand your statement. What are you trying to do?*

Mr. Joyner: What we propose to do by this witness, may it please Your Honor, and by the testimony which I proposed to reach now, is to show that his charts were prepared on two types of information, one type being the actual testimony both—

The Court: Suppose you ask him the question, and we will rule on it.

Mr. Joyner: All right.

Q. *Mr. Norris, I will ask you sir, whether in preparing these so-called indictment figures you took into consideration in your computation other matters besides those which we have witnesses here to testify about (1092), and if so, what these matters were?*

A. Only with respect to—

Mr. Hanover: Now, I would like for him to answer the question yes or no first, because I would like to make an objection.

The Court: Answer directly, and then you have the right to explain.

A. *Yes, sir.*"

Objection was made based on the reasons stated in this petition, and the objection was overruled (Appellant's Appendix 182a-183a).

On cross-examination of the witness Norris testified as follows (Appellant's App. 218a-219a):

> "Q. So, then, what you have shown here today, I believe you stated is based on your investigation and observation, is that right, Mr. Norris?
>
> A. Well, it is not based on my observation. It is based on the *facts* that I was able to assemble.
>
> Q. Based on what you think the *facts* are?
>
> A. *Well, it is part of my job to determine whether something is a fact, or whether it is hearsay, or just plain circumstance.*"

Government counsel in his closing argument to the jury made the following unprovoked remarks. We quote from argument:

> (1) "Don't you know, Gentlemen, if it had been the Government's case, that His honor, learned in the law, would have thrown this case out—not after we had been through it all—on our opening statements." (App. 301a).

Again,

> (2) "Don't you worry about innocent people being punished. Do you think his Honor, there is not a man of higher integrity in this country than the Judge who presides over this Court right now. Are you worrying about innocent people being punished with Judge Boyd presiding over this Court?" (App. 304a).
>
> (3) "If this was the flimsy little deal that counsel claims it is, this case wouldn't have been in Court five minutes—never would have been indicted." (App. 304a).

These remarks designated 2 and 3 were vigorously objected to. The Court made no immediate ruling (App. 304a, 305a), and again, in his concluding remarks, the District Attorney stated as follows:

> "But I am sticking to the facts of this lawsuit, and I think I have summed it up as well as I know how, and the fact remains now that the Grand Jury has done its duty, his Honor is doing his duty, Mr. Norris has done his, and my assistants and I have done mine, and I leave this case with you gentlemen with confidence, and urging you to carry out your duty, and to follow the evidence and the law, and if you do, you must come to the conclusion that the defendant is guilty under both counts of the indictment." (App. 310a, 311a).

While the remarks of the District Attorney designated No. 1 were not immediately objected to, upon the completion of the District Attorney's argument, counsel moved the Court to enter a mistrial, but was overruled.

The question regarding the fixing of fees involves the manner in which the witness Norris fixed the "average" fees alleged to have been received by the petitioner in sixty cases for the year 1949, and sixty cases for the year 1950 (Appellant's App. 182a, 183a).

These were cases in which the former clients of the petitioner were either dead, missing, or could not be located by the witness Norris. Witness Norris stated that he fixed the fees in these cases by a calculation of the average fee known to have been collected by the petitioner in other cases, and taking the figure he arrived at in the known cases, setting it up as the figure in sixty cases in 1949, and sixty cases in 1950, where he was unable to contact the former clients of petitioner, and there was no other proof adduced in open Court to support this theory of the Government.

According to the witness' computations, the petitioner received $93.10 in sixty cases in 1949, and $105.10 in sixty cases in 1950. Computation of these figures shows that for sixty cases in 1949, according to the Government's contention, petitioner would have received $5,586.00 additional income, and in 1950 she would have received additional income in the sum of $6,306.00 (Appellant's App. 188a).

The petitioner was convicted on two counts of an indictment. The pertinent part of Count 1 is quoted:

> "Did unlawfully, wilfully, and knowingly attempt to evade and defeat a large part of the income tax due and owing by her to the United States of America for the calendar year 1949 by preparing and causing to be prepared, signed and mailing and causing to be mailed in the Western Division, Western District of Tennessee, a false and fraudulent income tax return on her behalf, wherein it was stated that her net income for said calendar year was $8,119.23, and that the amount of the tax due and owing thereon was the sum of $1,419.48, whereas, as she then and there well knew, her net income for the said calendar year was the sum of $24,054.34 upon which said net income there was owing to the United States of America an income tax of $7,797.97, and which return the defendant filed or caused to be filed with the Collector of Internal Revenue for the Internal Revenue District of Tennessee."

The verbiage of the second count is similar to that of the first count, except for the year and the amounts of taxes.

The petitioner was sentenced under 145b of the Internal Revenue Code of 1939 as for a felony to three years on each count, to run concurrently, and fined $5,000.00 on each count, for a total of $10,000.00.

The petitioners should have been sentenced as for a misdemeanor, under Section 3616 (A) of the Internal Revenue Code of 1939.

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The trial court erred in permitting the introduction of the charts.

The Court of Appeals for the Sixth Circuit has applied the ruling laid down in Johnson v. U. S., 319 U. S. 503, to the facts herein, thus extending the doctrine of that case, which was not intended by the opinion, and such action of the Court of Appeals is in conflict with decisions of other federal courts of appeal, which courts have rejected such an extension of the doctrine.

Approximately *one hundred and seventy-four witnesses,* who, with the exception of a small number, were former clients, testified for the Government. Agent Norris testified that there were *more than two hundred and fifty-eight cases* not listed on petitioner's books, in which fees were collected by petitioner, and that *eighty-one cases* were understated in her income tax returns. This is a total of three hundred and thirty-nine cases, which means that Mr. Norris, the Government witness, apparently talked to or conferred with one hundred and sixty-five witnesses who did not appear in the courtroom, so, in giving his "expert testimony," the witness Norris took into consideration the statements of a hundred and sixty-five witnesses, or former clients, with whom he had apparently conferred, but who were not present in the courtroom, so that the jury could weigh their testimony, and the appellant was deprived of her right of cross-examination. Thus, the witness Norris passed on the credibility and weighed the testimony of these one hundred and sixty-five witnesses. Therefore, his testimony, rather than being a summation based on the entire record in open Court, became a conclusion based on his extensive "outside investigation."

Apparently the Government offered these exhibits, and the Court received them in evidence, on the theory that Mr. Norris was an *expert witness,* and that in a prosecution for income tax evasion, such a witness may give testimony of his computations based upon substantially the entire evidence in the record as to the defendant's income. We recognize that the Supreme Court of the United States, in *U. S.* v. *Johnson,* 319 U. S. 503, has upheld this theory. It is the contention of petitioner in this case that Exhibits 4, 5, 6, 7, 8, and 9 were something entirely different from that which was authorized or contemplated in the Johnson case. Petitioner says that Agent Norris went beyond the mere act of summarizing such testimony, and that he himself endeavored to pass upon the reliability or want of credibility of certain witnesses in making his summary. It is further contended that because he did so, Exhibits 4, 5, 6, 7, 8, and 9 constitute the substitution of Agent Norris' ideas and interpretations, in lieu of the evidence, and that, in consequence, the province of the jury was invaded.

After the Johnson case was decided by the Supreme Court, the Circuit Court of Appeals for the Third Circuit had before it almost precisely the same type of fact situation as is here reflected from the record. In *U. S.* v. *Ward,* 169 F. 2d 460 (C. C. A. 3), a Government witness who had purported to summarize the testimony of the predecessor witnesses went beyond the mere act of summarizing, and himself attempted to pass upon the reliability and credibility of the witnesses. The Government contended that, since he was an expert, and that since the Johnson case had been decided by the Supreme Court, it was not error for the Government witness to so testify.

In rejecting the extension of the doctrine in the Johnson case, the Court said:

"The effect of Johnson's testimony was not simply to exclude 'some Government testimony.' Rather, it affirmatively declared the unreliability of records and witnesses on a basis neither accessible to the jury nor assessable by it. Moreover, when Johnson testified that the witnesses whose testimony he had used in his calculations were considered by him to be 'reliable,' because their testimony coincided with the sworn statement they have previously given to the Federal Bureau of Investigation, he was once more performing a jury function, while endowing those witnesses with an aura of credibility, impenetrable by the jury."

The Court held that Johnson's testimony was erroneously admitted in evidence, and was prejudicial, and ordered a new trial.

In a similar factual situation as in the present case, the Fifth Circuit held, in *Steele* v. *United States*, 222 F. 2d 623-629, as follows:

"Recognizing that the Supreme Court in *United States* v. *Johnson*, 319 U. S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546, has held that in a prosecution for income tax evasion, an expert witness such as Howard purported to be may give testimony of his computation based upon substantially the entire evidence in the record as to the defendant's income, the defendant contends that the admission of these exhibits, their offer and reception in evidence, and their sending into the jury room, were something entirely different from what was authorized in the Johnson case; that *Agent Howard did not merely attempt to summarize the testimony; that on the contrary, he undertook to evaluate it, endeavoring to pass upon the credibility of certain witnesses, and to determine what weight should be given their testimony, so that, by his testimony as to the exhibits and their sending to the jury, the Government, through its witness Howard, was enabled to invade, indeed to take over the province of, the jury.*"

When these charts were introduced over the most vigorous protest of counsel the Court stated (App. 168a, 169a) that the charts were being introduced as *"merely explanatory of the witnesses' testimony and computation."* (App. 198a). *"Merely represents the Government's contention, they are not evidence."*

Apparently the Court allowed these exhibits to go in to show how Norris arrived at his results. This was misleading, for these charts show only *"what he arrived at."* The sending into the jury room of these charts for the jury to use in their deliberations certainly erased any effect the remarks of the Trial Judge was intended to have. Thus the Government was given an unfair advantage over the defendant. As indicated by the Court's remarks, the exhibits were accepted into evidence in a restricted manner. They were essentially interpretations, conclusions, and arguments of the witness, based on his own findings, and to allow these exhibits to go into the jury room would mean that the jury would take with them the argument and interpretations he placed on the people he contacted, and the witnesses who testified.

The Circuit Court of Appeals in its opinion made mention of the fact that the Trial Court stated it was for the jury to say "whether there is *competent* evidence in the record to support the figures" of the witness Norris. Thus it was left to the jury to pass upon the *legality* of the evidence, as well as the weight and credit to be given it. It was for the Trial Judge to say whether or not it was competent, and not the jury.

There were no guarding instructions given in the Judge's charge (Appellant's Supp. App. 11a).

The instructions given the jury at the time of the introduction of the charts by the Trial Judge were inade-

quate and insufficient, in view of the language of this Court in *Holland* v. *U. S.*, 348 U. S. 121, 75 S. Ct. 127-131, wherein the Court mentioned the great danger that may result to a defendant, in that the jury may assume that, once the Government has established its figures, in its net worth computations, the crime of tax evasion follows automatically, especially where the jury is allowed to take into the jury room the various charts, without guarding instructions.

II.

The remarks made by the District Attorney in his closing argument were improper and highly prejudicial, and the Court's refusal to grant a mistrial on the grounds of said prejudicial remark was error.

The remarks of the District Attorney with reference to the jury "worrying about innocent people being punished" had the effect of inducing the jury to *surrender their responsibility*, on the theory that the Court would prevent any injustice from being done.

One of the most damaging and prejudicial arguments that could possibly have been made was made by the United States District Attorney in the conclusion of his argument. There was no implication here—there was a plain, unvarnished statement that the Trial Court wanted the defendant convicted. He made the Court an advocate, an ally. So overpowering was the zeal and desire of the U. S. District Attorney for a conviction that he was willing to tell the jury in so many words that he and his assistants, the Government witness Norris, the grand jury, the Court, and the petit jury were members of a team which had the job of convicting the petitioner and sending her to the penitentiary.

Vierick v. *U. S.*, 318 U. S. 236, 248, 63 S. Ct. 561, 566:

"A Federal prosecuting attorney should not in addressing the jury make an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice and in so doing may constitute prejudicial error."

Pierce v. *U. S.*, 86 F. 2d 949, C. C. A. 6, 1936:

"Public interest requires that the Court of its own motion protects suitors and their right to a verdict uninfluenced by appeals of counsel to appeals of prejudice."

N. Y. Central Railroad Co. v. *Johnson*, 279 U. S. 310, 318, 49 S. Ct. 300, 302, 303:

"It is the duty of the Court to correct the right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."

Mendelsohn v. *U. S.*, 58 F. 2d 532, 61 App. D. C. 127:

"* * * It is always improper on the part of the District Attorney to suggest to the jury directly or indirectly that they *should surrender any of their responsibility with the idea that the Court will see to it that no injustice results.*"

Steele v. *U. S.*, (5th Cir.) 222 F. 2d 628-631:

"It will suffice to say of the second specification of error that, though the argument of the United States attorney was not objected to, it did go unadmonished and uncorrected so far out of bounds as to put the District Judge in error in not, of his own motion, admonishing the Government's counsel to desist from that kind of argument and directing the jury that the argument was incorrect and unfair, and that they should not consider it. * * * *Finally, the statement in*

the conclusion of his summation, linking himself, the jury, and the Judge as interested on the same side of the case cannot be justified or excused."

Snipes v. *U. S.*, 230 F. 2d 165-166-167 (6th Cir.). *Rule 52 (b), F. R. C. P.*

III.

The Court erred in permitting the witness Norris to testify as to his computations involving the manner and method of fixing "average fees."

The method of fixing the fees in one hundred and twenty cases for 1949 and 1950 in which the witnesses were dead, missing, and could not be located was purely a conclusion of the witness Norris, rather than a summary based on the proof in the record.

The amounts given to the jury were substantial, compared to the total amount involved, and had the effect of prejudicing the jury.

IV.

The defendant should have been sentenced under Section 3616 (a) of the Internal Revenue Code of 1939.

It is the contention of this petitioner that as a matter of law under the indictment in this case, she could only have been convicted of a misdemeanor under Section 3616 (a) of the Internal Revenue Code of 1939, imposing a maximum sentence of one year imprisonment and a fine of $1,000.00 on each count.

This Court has the right to correct petitioner's sentence, so as to conform to the statute.

The indictment in the present case is substantially the same as in the cases cited below:

Rule 52 (b), F. R. C. P.

Berra v. *U. S.*, 351 U. S. 131, 76 S. Ct. 685.

See brief of Poncett Davis as *Amicus Curiae* in *Costello, Petitioner*, v. *U. S.*, No. 666, filed October Term, 1956.

V.

The defendant was denied a fair and impartial trial.

The petitioner was denied a fair and impartial trial, but in view of the length of this petition, we will not discuss this point, other than to refer to the petitioner's motion for a judgment for acquittal (App. 222a to 227a).

CONCLUSION.

In conclusion, it is our contention that the matters complained of are *errors* affecting the substantial rights of the petitioner. As has been often stated, the question in a criminal trial is not whether guilt is spelled out of a record, but whether guilt has been found by a jury, according to procedures and standards appropriate for criminal trial in a Federal Court; not whether there is "overwhelming evidence," but whether such "overwhelming evidence" has been properly introduced into the record.

Justice Frankfurter in his opinion in *Bollenbach* v. *U. S.*, U. S. 326, pp. 607-614, states as follows:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by jury under appropriate judicial guidance, however cumbersome that process may be."

Forster v. *U. S.*, 237 F. 2d 617-621 (Ninth Circuit), decided October 19, 1956.

Kotteakos et al. v. *U. S.*, 328 U. S. 750.

PRAYER.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that Court to certify and send to this Court for its review and determination on the day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled on its docket, "*Madeline V. Smith* v. *United States of America,*" No. 12,897, to the end that said case may be reviewed and determined by this court as provided by 28 U. S. C., Sec. 1254, and the applicable rules promulgated by this court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 820

MADELINE V. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 2–3) is reported at 239 F. 2d 168.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1956, and a petition for rehearing was denied on February 6, 1957. (Pet 3.) The petition for a writ of certiorari was filed on March 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). (Pet. 3.)

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting into evidence charts summarizing the Government's alle-

gations of the petitioner's unreported income and tax, and testimony in explanation of their preparation.

2. Whether the prosecutor committed reversible error in his remarks in summation to the jury.

3. Whether the trial court erred in imposing a sentence on the petitioner under Section 145 (b), Internal Revenue Code of 1939, in excess of that which could have been imposed under Section 3616 (a) of the Code.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent

> to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *
>
> * * * * * *
>
> he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.
>
> (26 U. S. C. 1952 ed., Sec. 3616 (a).)

STATEMENT

On October 5, 1955, a two-count indictment was filed against the petitioner in the United States District Court for the Western District of Tennessee charging that she willfully attempted to evade and defeat a large portion of her income taxes for the years 1949 and 1950 by filing fraudulent returns in violation of Section 145 (b) of the Internal Revenue Code of 1939. The indictment charged that the amounts of net income and the tax liability as reported in the return and as corrected were as follows (R. 4a–5a):[1]

	Reported		Corrected	
	Net Income[1]	Tax	Net Income	Tax
Count I (1949)	$8,119.23	$1,419.48	$24,054.34	$7,797.97
Count II (1950)	9,445.74	1,725.49	25,910.35	9,387.13

[1] Petitioner reported as gross income the sum of $1,252.30 for the year 1949, and the sum of $14,950.50 for the year 1950. (R. 67a–68a.)

On February 13, 1956, after a jury trial, the petitioner was found guilty as charged and sentenced to three years imprisonment and fined $10,000 and costs.

[1] The record consists of three printed volumes comprising the appendices to the briefs in the Court of Appeals. The appellant's appendix, numbered 1a through 316a, and the Government's appendix, numbered 1b through 107b, are designated herein as "R". The appellant's supplemental appendix, numbered 1a through 38a, is designated "Supp. R."

(R. 34a.) Subsequent motions to arrest judgment and for a new trial were denied. (R. 46a–47a.) The Court of Appeals affirmed the conviction, and denied a rehearing. (Pet. 2–3.)

The petitioner is a lawyer whose practice was confined almost exclusively to divorce matters. The bulk of the Government's evidence showed receipt of specific items of unreported income. Approximately 140 witnesses testified that they had paid the petitioner legal fees during the two years involved. (R. 6b–72b, 5b; 120a.) Their testimony indicated that approximately $20,000 had been received, of which only $1,930.50 was recorded in her books and reported. (R. 201a.) Receipt in 1949 of $1,992.50 in fees which were not reported was evidenced by her records. (R. 174a–175a.) Records of courts in which petitioner had practiced showed total refunds to her in the years 1949 and 1950 of $1,365.85 in docket fees, etc., which petitioner did not return to clients or report on her returns. (R. 175a, 200a.)

The Government also introduced evidence of bank deposits and expenditures indicating that petitioner's net income was approximately $27,000 in 1949, and $24,000 in 1950. Net worth proof submitted in corroboration indicated that petitioner had a net income of $24,000 in 1949, and $25,000 in 1950. (R. 192a–193a).

ARGUMENT

1. Petitioner contends that six charts prepared in advance of trial by the investigating agent, Hubert Norris, summarizing her reported and alleged income and tax were not supported by the evidence, and that the trial court therefore erred in permitting them to be

introduced.[2] (Pet. 15.) She also objects, for the same reason, to Mr. Norris' testimony explaining the method he used in computing certain figures on the charts. (Pet. 21.)

Petitioner states that in computing the corrected net income shown on the chart, Mr. Norris included legal fees she received from 339 divorce cases, whereas the Government produced only 174 witnesses, and concludes therefore that he (Pet. 15)—

> took into consideration the statements of a hundred and sixty-five witnesses, or former clients, with whom he had apparently conferred, but who were not present in the courtroom * * *.

This conclusion is not supported by the record. It ignores the voluminous documentary evidence (R. 76a, 80a, 83a, 85a–87a, 89a, 97a, 101a, 105a–107a, 192a, 204a, 209a), and the testimony of witnesses whose testimony was not confined to the payment of fees in a single case (R. 72a–76a, 79a–91a, 96a–114a), which, together with the testimony of the receipt of income limited to a single case, substantially supported the charts. (R. 165a.) Contrary to petitioner's contention (Pet. 15), the charts were computations based on substantially the entire record as to petitioner's income.

The unreported income figures shown on the charts were computed on the basis of receipts shown in the petitioner's own books, refunds evidenced by court records, and legal fees understated or omitted from her books. (R. 158a, 174a–175a, 177a.) Inclusion of

[2] The petitioner states that these charts were prepared more than two years before the trial. (Pet. 3.) Nothing in the record supports this statement. Mr. Norris testified that he prepared them about a week before the trial began. (R. 216a.)

the latter receipts was based substantially on the testimony of the numerous witnesses evidencing specific payments. However, court records showing the cases in which petitioner had appeared as counsel, and her bank deposits, indicated that she received fees in excess of those that could be shown by specific item proof. Accordingly, to reflect this income Mr. Norris projected the fee income evidenced by specific item proof by finding the average of these fees and multiplying it by the number of cases not represented by specific item evidence in which the court records indicated petitioner had appeared. This was done for both years involved. (R. 187a–192a.) The projected income was not, as the petitioner alleges, purely a clusion of Mr. Norris (Pet. 21), but an attempt to make intelligible to the jurors the relationship between unexplained bank deposits and the large number of cases in which the petitioner had appeared as counsel from which she had reported no income.

The petition, recognizing this Court's decision in *United States* v. *Johnson*, 319 U. S. 503, apparently concedes the admissibility of summarizing charts and testimony based on substantially the entire record,[3]

[3] It is well settled that the Government may summarize by charts and testimony where the record presents a complicated set of facts. *United States* v. *Kelly*, 105 F. 2d 912, 918 (C. A. 2d); *United States* v. *Schenck*, 126 F. 2d 702, 708–709 (C. A. 2d), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705; *United States* v. *Augustine*, 189 F. 2d 587, 589 (C. A. 3d); *Bell* v. *United States*, 185 F. 2d 302, 306–308 (C. A. 4th), certiorari denied, 340 U. S. 930; *Lloyd* v. *United States*, 226 F. 2d 9, 16–17 (C. A. 5th); *Hanson* v. *United States*, 186 F. 2d 61, 67 (C. A. 8th); *Kampmeyer* v. *United States*, 227 F. 2d 313, 317 (C. A. 8th), motion for leave to file petition for certiorari denied, 351 U. S. 904; *Bateman* v. *United States*, 212 F. 2d 61, 68 (C. A. 9th); *Gendelman* v. *United States*, 191 F. 2d 993, 996–997 (C. A. 9th), certiorari denied, 342 U. S. 909; *Graves* v. *United States*, 191 F. 2d 579, 584 (C. A. 10th).

but contends that Mr. Norris went beyond this in his computations and invaded the province of the jury to pass on the credibility of the evidence. (Pet. 16, 21.)

As this Court pointed out in *United States* v. *Johnson, supra* (p. 519), no issue is withdrawn from the jury when the trial judge's instruction to the jurors makes it clear that the correctness and credibility of the evidence underlying the computations is for them to determine. Such instructions were repeatedly given here. (R. 161a–162a, 166a, 169a, 173a, 178a, 185a, 190a.)

In *United States* v. *Ward,* 169 F. 2d 460 (C. A. 3d), relied upon by the petitioner (Pet. 16), the Court of Appeal reversed because the Government's witness in giving computations admittedly disregarded the testimony of witnesses he believed unreliable, thereby passing on their credibility (pp. 462–463). Here, Mr. Norris carefully noted the testimony of each witness to insure that his computations conformed substantially with the proof. (R. 165a.) The case of *Steele* v. *United States,* 222 F. 2d 628 (C. A. 5th), cited by the petitioner (Pet. 17), is also distinguishable on its facts. The reversal there rested principally upon the court's conclusion that the peculiar circumstances under which two charts were sent to the jury room after deliberations had begun invested them with a special "air of credibility" in the jurors' eyes (p. 630, *supra*).

2. Petitioner alleges that the United States Attorney by stating to the jurors in summation (R. 304a): "Are you worrying about innocent people being pun-

ished with * * * Judge Boyd presiding over this Court," induced them to surrender their responsibility to the court. (Pet. 19.) The record does not sustain this contention. The prosecutor repeatedly impressed upon the jurors that they had the sole responsibility of weighing the evidence and determining the petitioner's guilt. (R. 256a, 258a, 263a, 269a.) Immediately preceding the remark complained of, the prosecutor told the jurors that they were to be guided only by the evidence and the court's instruction. (R. 304a.) Moreover, the petitioner's counsel in his closing argument had inferred that only Mr. Norris was of the opinion that there was sufficient evidence to warrant the prosecution. (R. 273a, 282a–283a, 287a, 290a–291a.) The prosecutor's remark properly sought to refute this inference.

3. Petitioner raises the question of the legality of her sentence and the validity of the indictment under Section 145 (b) of the Internal Revenue Code of 1939, alleging that the facts here could only constitute an offense under Section 3616 (a) of the 1939 Code. (Pet. 21.) This issue was not raised in the courts below. In *United States* v. *Doyle,* 234 F. 2d 788 (C. A. 7th), certiorari denied, 352 U. S. 893, and *Moran* v. *United States,* 236 F. 2d 361 (C. A. 2d), certiorari denied, 352 U. S. 909, where the identical question was also not properly raised in the trial court, this Court denied certiorari. In *Costello* v. *United States,* 221 F. 2d 668 (C. A. 2d), now pending on certiorari, this Term, No. 666, the issue was properly raised by motions under 28 U. S. C. 2255 and Rule 35 of the Federal Rules of Criminal Procedure; and in *United States* v.

Achilli, 234 F. 2d 797 (C. A. 7th), now pending on certiorari, this Term, Nos. 430 and 834, the petitioner contended that a motion in the trial court raised the issue and later moved for a correction of sentence under 28 U. S. C. 2255.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied. However, since the petition raises the question also involved in the *Achilli* and *Costello* cases (Nos. 430, 666, and 834), this Court may wish to defer disposition of the instant petition until those cases are decided.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1956.

No. 820.

MADELINE V. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A REHEARING.

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PETITION FOR A REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petitioner, Madeline V. Smith, respectfully presents this, her petition for a rehearing, and states that in so doing she is conforming with the rules of this Court with respect to the requirements of such a petition.[1]

The new matters presented and emphasized in this petition are these:

[1]Supreme Court Rule 58.

(1) That during the trial a question arose in connection with the books of account which had been kept by the defendant in her business. These books had been examined by the witness Norris, a Government Intelligence Agent.

For the purpose of emphasizing this question, we quote from the record (App. 205a, 206a, 207a, 208a—Direct testimony of Hubert Norris):

Q. Mr. Norris, after you had these photostats made, and I ask you whether those are photostats of the records furnished you by Mr. Tual on behalf of Mrs. Smith?

A. Yes, sir.

Q. What happened to the originals after you made these photostats?

A. They were returned.

Q. To Mrs. Smith?

A. They were returned to Mr. McBride.

Q. Who then represented Mrs. Smith?

A. Yes, sir.

Q. Have you seen them since?

A. No, sir.

Q. If they were lost, stolen, or destroyed, you don't know? You sent them back? (1132).

A. We returned them to Mr. McBride.

Q. Necessarily, these photostats do not show the color ink in which they were written?

A. The writing all appears in white and the rest is in black.

Q. They are negative photostats, so to speak. Did you make an examination of the originals, and from the originals make certain notations on the back of your photostats as to the color ink involved in the various entries?

A. Yes, sir.

Q. I will ask you whether or not you have some there?

A. Yes, sir.

Q. On which you made such notations?

A. I do.

Q. Pick me out one of them there. It doesn't make any difference which one. I don't want your opinion about the handwriting. I just want you to tell me what you saw at that time as to the color ink on any one of them.

A. Would you want me to identify which one I am talking about?

Q. Yes, sir, just identify it, if you will.

Mr. Dave Hanover: I would like him to (1133) give me the page number at the time he is doing it may it please Your Honor?

The Court: *Aren't the originals available at this time?*

Mr. Joyner: *We would like to have them, but we are in no position to have them. Might I inquire of counsel if the originals are available?*

Mr. Dave Hanover: *We would like to have a conference about that, may it please the Court.*

Mr. Joyner: *We don't make any point about it. That is all right.*

Mr. Dave Hanover: *Of course, that puts us in a very bad position, calling on us at this time to produce evidence.*

Mr. Joyner: *We are not requesting you to produce evidence at all. We don't want the record to indicate that we are.*

Mr. Dave Hanover: *You have done it in the presence of the jury, Mr. Joyner.*

The Court: We will go ahead with the other photostats.

Mr. Joe Hanover: I think the jury should be instructed not to consider what has taken place.

Mr. Dave Hanover: If Your Honor please (1134), we would like a conference about that because I don't know what light the jury might take of my conduct now. I don't know whether we would like to produce them or not.

The Court: We are magnifying something that is not too important here. I did instruct the jury not to consider the Court's instructions.

Mr. Dave Hanover: We will give it to them right now.

The Court: It might save us all a little trouble expediting the matter.

Mr. Dave Hanover: Of course, we are producing it, but we are reserving an exception to Mr. Joyner's remarks.

The Court: Just a moment. The records will not be accepted under those conditions. The defendant is not required to give evidence of any character against herself, if that is the point you are making at this time.

Mr. Dave Hanover: We wanted to produce them at the proper time.

The Court: That is ended, and the jury will not consider it.

Mr. Joyner: We decline them (1135).

Mr. Dave Hanover: We are offering them.

The Court: Do you offer them freely and voluntarily at this time?

Mr. Dave Hanover: We offer them under the circumstances under which they were requested, may it please the Court.

The Court: Just a moment. Defense counsel has produced what appears to be two loose leaf ledgers, and from which the photostats about which the witness is about to testify were taken. Now he was about to testify concerning the ink, the type of ink, which was used in

making the entries onto the original ledger sheet. Without stopping to consider for one moment that there is any question—I don't know how important it is, the type of ink that was used, in the first place—but not stopping to consider for a moment that it made any difference, one way or the other, the Court suggested that if the original were available at this time it might expedite this particular phase of the investigation if they were made available.

Now, counsel for the defendant has produced these two loose leaf binders and they are on the (1136) table, but they are not freely and voluntarily produced. And it is certainly not proper to require the defendant to give evidence against herself, if it may be considered that. In the circumstances here, I don't think it is. But under these conditions, as I say, the tender of defense counsel is declined. The Government counsel will proceed with the examination of the witness, using the photostats about which the witness was about to testify.

Mr. Joyner: Let the record show these are being shoved out of Government counsel's way and back over to defense counsel's table at this time.

Mr. Dave Hanover: Let the record show that the books for 1949 and 1950 are on the counsel table.

Mr. Fitzhugh: They are in front of you.

The Court: All right, that settles that, Gentlemen. No more about that. That is settled (App. 211a, Motion for Mistrial).

(The following occurred at the bench, and out of the presence and hearing of the jury:)

Mr. Hanover: In view of what transpired in connection with the books, we had no way in which to extricate ourselves without doing prejudice to ourselves, and we feel that the whole incident prejudiced the jury against

the defendant, and we therefore ask the Court to grant us a mistrial.

The Court: No, if anything happened that (1142) would give the jury the wrong impression about it, it was something you gentlemen who represent the defendant did yourselves. That is what the Court would like to observe about it. And, in any event, there was not any prejudice one way or another about it.

Mr. Fitzhugh: Let the record show I did not see the books, either.

The Court: And so—

Mr. Dave Hanover: The record shows that you saw the bound volumes. You did not look into the books, but the record shows the bound volumes were there.

Mr. Joyner: After you slammed them up in front of us.

Mr. Fitzhugh: After you slammed them up there.

The Court: You are making what sort of motion?

Mr. Hanover: Sir?

The Court: You are making what sort of motion?

Mr. Dave Hanover: My motion is for a mistrial (1143.)

The Court: Well, it is overruled.

Mr. Hanover: Of course, I want to make this further observation, that the whole thing transpired in the presence of the jury (Adjournment).

It was error not to enter a mistrial, for the reason that the said request in the presence of the jury amounted to a request or demand made upon the accused, after it was apparent that the books or copies of what the witness was testifying to were in the defendant's possession, and the defendant was required either to produce it, deny, or explain it, or by her very silence, permit inferences to be drawn against her, quite as prejudicial as positive testimony would be. This was further error, for the further

reason that the evidence required to be produced was incriminating in nature, and to produce such evidence under the circumstances then and there existing, in the presence of the jury, would have required the defendant to produce evidence against herself, in violation of the Fifth Amendment of the Constitution of the United States.

It was further error not to enter said mistrial, for the reason that it was all highly prejudicial to the defendant's rights, and no amount of instructions to the jury could overcome the prejudice created, in that a substantial right of the defendant was violated.

McKnight v. *U. S.*, 6th Cir., 115 F. 2d 972, 977, 978, 979, 980, 981.
Meter v. *United States*, 5th Cir., 120 Fed. 504-505.
Hibbard v. *U. S.*, 7th Cir., 172 Fed. 66, 71, 72.

(2) The witness Norris, the Intelligence Agent who testified as an expert for the Government, was allowed, over the objection of the defendant, to testify as to what he had found in the books of appellant, and in his discussions with former clients, for the year 1948, not being a year for which she was indicted for failing to pay sufficient income tax.

The witness testified (App. 180a, 181a) that for the year 1948, the *witnesses he found, the figures, the books,* and *the pattern,* were the same as were the same items for 1949 and 1950. Counsel objected, on the grounds that the jury was the best judge of what the witnesses who testified relative to 1949 or 1950 said or did, and not Mr. Norris. This objection was overruled. Here again, the witness Norris gave his conclusions as to 1948, which placed him in the position of passing on the credibility of the persons he contacted, and the credibility of the Government's witnesses for 1949 and 1950, and the weight to be given their testimony.

(3) At the conclusion of the Government's proof a motion was made by the defendant to strike from the record the testimony of the witness Hall, a bank auditor, who was used by the Government in an attempt to corroborate or to establish its case by the "deposit and withdrawal" method. On cross-examination of the witness, it was admitted by the witness Hall that approximately $32,000.00 of the funds alleged to have been deposited by the defendant in the year 1949 was merely a transfer of funds from a savings account to a building account. (App. 114a, 115a, 116a, 117a). Inasmuch as this created a fictitious figure, it could serve but one purpose, and that, to prejudice the defendant, in that, by the direct testimony of the witness, it created the inference that the defendant had actually more income than she reported. The Witness Hall testified on direct examination that $31,899.00 was withdrawn from savings account 109604 during the year 1949. Government counsel, in their zeal to convict, made no effort to show by this witness the $30,000.00 withdrawn from savings account 109604 as redeposited during the year 1949 in the building account, and $1,899.00 deposited in a checking account. The computations of the witness Hall (App. 110a, 111a, 112a, 113a) were contained in an exhibit marked as "Exhibit No. 11." (App. 113a). Thus it was that there was created in the minds of the jury a fictitious figure of $61,597.13, as being deposited by the defendant for the year 1949, and that she also had available funds for that year of $97,492.19, when, as a matter of fact, these figures were subject to be decreased by $31,899.00. These admittedly incorrect figures by the witness Hall were highly prejudicial to the defendant, and no doubt it assumed an existence in the minds of the jury.

(4) A series of errors was committed in the course of the trial, which in their cumulative effect, taken as a

whole, show the extreme prejudice suffered by the defendant, to the extent that there was a denial of a fair trial.

In his cross-examination of Mrs. Irene MacDonald, secretary to the defendant, and a witness in her behalf, Mr. Vaden, whenever the witness answered either that she did not know, or did not remember, would read from memoranda in his hands concerning certain purchases made by the defendant (App. 227a, 228a, 229a, 230a, 231a, 232a).

When objection was made to this prejudicial type of examination, Mr. Vaden announced that he would withdraw the statement made by him. This practice was repeated, and after the Court *suggested that it was not proper* (App. 230a), the same type of prejudicial cross-examination was continued. This was highly prejudicial, for the reason that "evidence" was given the jury that was not otherwise presented, and was, in effect, "testimony" by Government counsel, and designed to inflame the jury against the defendant.

During the testimony of Jack A. Estes, a Government witness, during which he testified that he had paid his attorneys, Johnson, Miller & Collins, on two occasions, a total sum of $136.00, for which he had receipts to show that said sums had been received from him by his attorneys, to be paid to the defendant who was his wife's attorney, an attempt was made by the Government to introduce the receipt, an objection was made (App. 120a, 121a, and 122a). Then the following occurred:

Mr. Walsh: If your Honor please, we object to the introduction of these exhibits except for the purpose of showing that money was paid to his lawyer.

Mr. Joyner: *Does counsel contend Mrs. Smith didn't receive it?*

Mr. Walsh: If Your Honor please, I have made my objection to the Court.

The Court: The objection is overruled.

Mr. Walsh: Note an exception.

The Court: Again, the objection goes rather to the weight to be given it here. As a matter of fact, the witness says he paid the money to his sister—

Mr. Walsh: If Your Honor please, that is what—

The Court: (Continuing)—*Stating that* (943) *it was to be paid to Mrs. Smith. As to whether or not she received it, it will be up to the Government to prove it.*

Mr. Walsh: That is right, Your Honor, and that is the purpose of our objection.

The Court: *Well, so we can get down to it, does she deny receiving this money?*

Mr. Dave Hanover: Your Honor we don't make any statement about that at this time.

The Court: All right, the evidence is competent—

Mr. Dave Hanover: Note our exception.

The Court (Continuing): For what it is worth. All right.

(Said two receipts were accordingly marked as Collective Exhibit 1 to the testimony of Mr. Estes, and same will be found among the exhibits hereto.)

Not only was the evidence incompetent to show payment to the defendant, but the conduct of the Court, and the Assistant District Attorney in asking in the presence of the jury if the defendant denied receiving the money, was highly prejudicial, for the reason that it required the defendant to give incriminating evidence against herself, contrary to the Fifth Amendment to the Constitution of the United States. As was said in *McKnight* v. *U. S., supra,* the defendant was required to "deny, or explain it, or by her

very silence, permit inferences to be drawn against her, quite as prejudicial as positive testimony would."

The burden was on the Government to show that the defendant had received taxable income, and by thus placing the defendant on a so-called "spot," without a denial, could leave but one inference with the jury. The Court's remarks regarding the purpose of the witness' testimony further emphasized the Government's contention in the matter, and coupled with the refusal to sustain the defendant's objection, clothed this testimony with the character of competent evidence.

During the direct testimony of a witness for the Government, in an attempt to show that the defendant was attorney for a certain person, and after objection had been made to the witness' testimony, the following occurred (App. 73a):

Q. Mr. Dunavant, refer, I think it is number—,

Mr. Joyner: *If there is no contention about that, would you like to stipulate that she is one of the attorneys of record?*

Mr. Dave Hanover: I am going to try my case as I go along, Mr. Joyner.

Mr. Joyner: All right.

This was highly prejudicial, and violated the defendant's constitutional rights, and required the defendant to give incriminating evidence against herself.

Although Government counsel made a request with reference to a "stipulation," it required either an admission or a denial from the defendant.

The District Attorney made certain inflammatory remarks with reference to the fees defendant was alleged to have charged (App. 306a, 307a), which were in the con-

cluding argument of Mr. Fitzhugh, and were designed to inflame and prejudice the jury against the defendant, in that she overcharged her clients, *that she charged $750.00 for five or ten minutes' work.*

Mr. Joyner, Government counsel, stated to the jury in his opening argument to the jury that certain *specified fees* (App. 262a) *did not appear on the defendant's books, and were not reported.* After counsel's objection, which the Trial Court overruled, by stating that the jury would determine what was said by the witnesses, Government counsel stated to the jury that he relied upon the testimony of Mr. Norris for this proof (App. 263a).

The testimony of the witness Norris did not disclose any such testimony. This is prejudicial, in that it amounted to testimony by a government attorney, and vested his statement with credibility and weight, which the ordinary witness would not possess, due to the position of the Assistant District Attorney.

(5) On February 6, 1956, the date of the trial (App. 54a, 55a), counsel advised the Court that the defendant was not ready, and had not had sufficient time to prepare for trial, and submitted to trial under protest.

During the testimony of the witness Hall, an official of the First National Bank, where the defendant did her banking, while testifying as to deposits and withdrawals (App. 88a, 89a, 90a, 91a, 92a, 93a, 94a, 95a, 96a, 97a, 98a, 99a, 100a, 101a, 102a, 103a, 104a, 105a, 106a) counsel objected and complained that the defendant was being taken by surprise in the line of testimony being given by the witness, especially with reference to the years prior to the indictment. Although the Trial Judge contended that counsel was not being taken by surprise, he apparently recognized that counsel was, by tendering

the record to counsel at that time for overnight inspection —evidence the Government had had for months, even years. Counsel accepted the opportunity to inspect the evidence, but certainly it was obvious that counsel during overnight interval could not prepare to meet these issues.

This was highly prejudicial, especially with reference to the years prior to the years alleged in the indictment.

Singer v. *United States*, 3rd Cir., 58 Fed. Rep. 2nd, 74-76.

(6) On January 3, 1956, the defendant filed her motion for discovery and inspection (App. 28a and 29a), to which motion for discovery and inspection was attached as Exhibit "A" (App. 30a and 31a), a letter sent out by the United States Treasury Department dated April 15, 1952, to various clients of the defendant, seeking certain information, as set out in said exhibit.

On pages 24a, 25a, 26a, and 27a, there is set out a letter addressed by the defendant's counsel to the United States District Attorney, which letter was dated December 22, 1955, and which was made an exhibit, and is part of Exhibit "A" to the amended and supplemental motion for a bill particulars (App. 18a).

However, reference is here made to paragraph three of said letter (App. 27a), in connection with the matter now under discussion.

An order was entered January 17, 1956 (App. 31a, 32a), denying the motion for discovery and inspection. The denial of said motion was highly prejudicial to the defendant, and violated a substantial right of the defendant. *Jencks* v. *U. S.*, No. 23, October term, 1956, decided by this Court June 3, 1957, Rule 52, Sec. B., F. R. C. P.

CONCLUSION.

In the belief that a re-examination of the record will compel the conclusion that the petitioner did not have a fair and impartial trial, such an examination is respectfully requested.

Respectfully submitted,

HANOVER, HANOVER, HANOVER, & WALSH,
219 Adams Avenue Building,
Memphis, Tennessee,
By DAVID HANOVER,
Attorneys for the Appellant.

CERTIFICATE.

State of Tennessee, County of Shelby.

The undersigned, David Hanover, attorney for the petitioner, Madeline V. Smith, hereby certifies that the foregoing petition is presented in good faith, and not for delay, and he also certifies that the petition is restricted to substantial grounds available to petitioner, but not previously presented, and in accordance with Rule 58, Sec. 2.

/S/ DAVID HANOVER.
DAVID HANOVER.

PROOF OF SERVICE.

I, David Hanover, one of the attorneys for petitioner, Madeline V. Smith, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25 day of June, 1957, I served 3 copies of the foregoing Petition for a Rehearing on respondent by mailing 3 copies thereof in duly addressed envelope, with adequate prepaid postage, to the Solicitor General of the United States, Washington, D. C.

David Hanover.